

APR 3 1987

JOSEPH E. SPANIOLO, JR.,
CLERK

No. 108, Original

IN THE
Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

**NEBRASKA'S MEMORANDUM IN OPPOSITION TO
THE MOTION OF THE NATIONAL AUDUBON SOCIETY
FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS
LITIGATING AMICUS CURIAE**

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

April 3, 1987

9/11

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE NATIONAL AUDU- BON SOCIETY FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE	1
CONCLUSION	3
CERTIFICATE OF SERVICE	6



TABLE OF AUTHORITIES

	Page
CASES:	
<i>Columbia Gas & E. Co. v. American Fuel & Power Co.</i> , 322 U.S. 379 (1944)	2
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907)	1
<i>Vinson v. Washington Gas Light Co.</i> , 321 U.S. 489 (1944)	2
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922)	1
STATUTES:	
Endangered Species Act, 16 U.S.C. §§ 1531-1543	1
Endangered Species Act, 16 U.S.C. § 1531(c)(2)	2

No. 108, Original

IN THE
Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

**NEBRASKA'S MEMORANDUM IN OPPOSITION TO
THE MOTION OF THE NATIONAL AUDUBON SOCIETY
FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS
LITIGATING AMICUS CURIAE**

The National Audubon Society owns and maintains the Lillian Annette Rowe Sanctuary, some 800 acres of habitat along the Platte River, and is currently participating with the State of Nebraska in the Platte River Management Joint Study. To the extent that the Society has water rights associated with the sanctuary and to the extent that it has elected to cooperate with the state in analyzing the management of the Platte River in Nebraska, the Society is adequately represented in these proceedings by the State of Nebraska. *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907).

The Audubon Society, however, asserts that it has a unique interest in Nebraska's petition to enforce the Court's Decree of October 8, 1945, as amended on June 15, 1953. According to the Society, "it is asserting its rights under federal law." Brief in Support of Motion for Leave to Intervene at 10.

The federal law to which the Audubon Society alludes is the Endangered Species Act, 16 U.S.C. Sections 1531-1543, passed in 1973. The Act was prospective in nature, declaring the policy of

the United States to "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. Section 1531(c)(2). Failing to recognize that Nebraska seeks to enforce a 40 year old apportionment decree, as opposed to seeking a new apportionment, the Audubon Society complains that "decisions about what water will flow from the North Platte into Nebraska and on to the Platte" may impair Audubon's ability to enforce the Endangered Species Act. *Ibid.* at 9-10. The apportionment, however, is an historic fact.

Not knowing "precisely [it's] contemplated role in this proceeding," Audubon asserts that "at a minimum [it] will seek to establish . . . minimum water flows and release schedules essential for maintaining the habitats of . . . endangered bird populations." *Id.* at 10 n. 10. Like the Platte River Trust, in other words, Audubon does not seek to intervene in the ordinary sense of the word, but to try a new and different case. Audubon should not be allowed to enlarge the issues or alter the nature of the proceedings. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944). Like any other intervenor, Audubon is limited to the issues tried by the original parties. *Columbia Gas & E. Co. v. American Fuel & Power Co.*, 322 U.S. 379 (1944). Accordingly, Audubon should be precluded from intervening for the purposes it seeks to intervene.

CONCLUSION

To the extent the National Audubon Society seeks to aid in the enforcement of the decree, its interests are fully and adequately by the State of Nebraska. Nebraska, however, does not oppose Audubon's appearance in the conventional role of an *amicus curiae*.

Respectfully submitted,

ROBERT M. SPIRE

Attorney General of Nebraska

Department of Justice

State Capitol

Lincoln, Nebraska 68509

(402) 471-2682

~~LEROY W. STEVENS~~

Assistant Attorney General



RICHARD A. SIMMS

Special Assistant Attorney General

Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY

Post Office Box 2068

Santa Fe, New Mexico 87504-2068

(505) 982-4554

No. 108, Original

IN THE
Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or to Participate as Litigating Amicus Curiae were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 3rd day of April, 1987 to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Wyoming Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Duane Woodard
Colorado Attorney General
Department of Law
1525 Sherman Street, Third Floor
Denver, Colorado 80203

Charles N. Woodruff
Moses, Wittemyer, Harrison and Woodruff, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302.

Abbe David Lowell
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Joseph N. Onek
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037

A stylized, handwritten signature in black ink, appearing to read 'R. A. Simms', positioned above a horizontal line.

RICHARD A. SIMMS
*Special Assistant Attorney General
Counsel of Record*

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

